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Via Federal Express

July 23, 2012

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**Re: Notice of Objection to EPA Notice of Non-Compliance and Directed Revisions to the
Portland Harbor Draft Final Baseline Human Health Risk Assessment and Request
for Dispute Resolution
Lower Willamette River, Portland Harbor Superfund Site, USEPA Docket No:
CERCLA-10-2001-0240**

Dear Chip and Kristine:

On June 22, 2012, EPA provided a redlined version of the main text and certain attachments to the Lower Willamette Group's May 2, 2011 draft final Baseline Human Health Risk Assessment (BHHRA) ("June 22 letter"). The June 22 letter directed the LWG to revise the BHHRA consistent with the accompanying redline and with additional directed comments on tables and figures to the BHHRA. EPA's cover letter states that "EPA has determined that the LWG failed to produce a BHHRA of acceptable quality, or otherwise failed to perform in accordance with the requirements of the Order by failing to fully correct all deficiencies and incorporate all information and comments supplied by EPA on prior versions of the BHHRA." In its follow-up letter dated June 29, 2012 ("June 29 letter"), EPA stated that stipulated penalties are accruing as of June 22 because the BHHRA was not of acceptable quality.

Pursuant to § XVIII of the September 28, 2001 Administrative Settlement Agreement and Order on Consent (Consent Order), the LWG hereby initiates dispute resolution with regard to (1) EPA's June 22, 2012 determination that the LWG "failed to produce a BHHRA of acceptable quality, or otherwise failed to perform in accordance with the requirements of the Order" and (2) EPA's June 22, 2012 directed revisions to the BHHRA's text, tables, and figures. The LWG's objections and the bases for those objections are stated below and in the enclosed tables.

The LWG strongly disagrees with and objects to EPA's directed revisions to the draft final BHHRA, EPA's determination that the LWG has failed to comply with the Consent Order, and the potential imposition of stipulated penalties. In the interest of streamlining the dispute, the LWG has provided representative examples rather than an in-depth submittal for each directed revision. LWG hereby reserves its right to supplement the record with more specific substantive responses to each of the redlined changes and comments on the tables and figures that are new, inconsistent or otherwise without technical or substantive merit.

The LWG does not expect the dispute resolution process to interfere with EPA's review of the draft Feasibility Study submitted on March 30, 2012. EPA has committed to the Portland community that it intends to prepare a proposed plan and issue a Record of Decision by 2014, and EPA has separate technical staff members assigned to the draft FS and BHHRA.

The BHHRA faithfully reflects EPA's extensive prior comments and agreed upon resolutions

The BHHRA was the subject of extensive review by, and repeated comments from, EPA. Between December 2009 and July 2010, EPA provided more than 200 comments on the October 2009 draft BHHRA. EPA's July 16, 2010 cover letter transmitting these comments, as well as several hundred additional comments on the draft Remedial Investigation Report and draft Baseline Ecological Risk Assessment, stated that EPA was providing its "complete set of comments" on the draft RI and baseline risk assessments and had "attempted to provide clear direction on the specific revisions that are needed to resolve the comments." EPA and the LWG thereafter engaged in several months of detailed technical negotiations to resolve EPA's comments. The resolution of all of EPA's comments was documented in tables generated by the LWG and acknowledged by EPA as follows:

- *LWG General Responses to EPA Directive Comments on the Baseline Human Health Risk Assessment*, September 15, 2010 (acknowledged by EPA letter dated September 22, 2010)
- *LWG General Responses to EPA Non-Directive Comments on the Baseline Human Health Risk Assessment*, November 18, 2010 (acknowledged by EPA letter dated December 8, 2010)
- *LWG Response to EPA's General Comments on the RI, BHHRA and BERA*, January 12, 2011 (acknowledged by EPA letter dated February 25, 2011).

EPA's letters acknowledging the written resolution of the comments are clear and unambiguous. The LWG relied on and complied with the written resolutions, as well as pertinent EPA national risk assessment guidance, in preparing the revised version of the BHHRA. EPA's June 22, 2012 letter and the directed revisions to the BHHRA entirely disregard these agreements to resolve EPA's comments on the BHHRA, which EPA advised LWG were its "complete set of comments" necessary to finalize the BHHRA.

A detailed compilation of the instances in which EPA's June 22 revisions to the draft BHHRA either fail to honor EPA's agreements with the LWG or are inconsistent with EPA's own prior comments and directed changes on the BHHRA is provided in the enclosed Tables 1

and 2.¹ EPA's comments on the October 2009 draft BHHRA, documentation of EPA and LWG agreements related to the revision of the BHHRA, and the May 2, 2011 draft final BHHRA, redlined to show changes in response to EPA comments on the October 2009 draft, are attached at Tabs 1 through 17.²

The LWG was surprised at the scope and magnitude of EPA's comments, given the previous substantive resolutions. The LWG had no reason to believe, then or now, that EPA was reversing the written resolutions of comments it had previously negotiated with the LWG. We are hopeful that the positions stated in EPA's June 22 and 29 letters are inadvertently in conflict with EPA's prior directions and that EPA will simply withdraw those letters and revise its comments such that they are consistent with and honor EPA's prior direction.

EPA's change of its prior approach and documented resolution is arbitrary and capricious

EPA's change of its prior negotiated and approved approach to developing the BHHRA and its abandonment of existing agreements with the LWG constitutes arbitrary and capricious agency action in violation of the Administrative Procedure Act. "[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so." *Wisconsin Valley Improvement Company v. Federal Energy Regulatory Commission*, 236 F. 3d 738, 748 (D.C. Cir. 2001). *See also, Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668, 687 (9th Cir. 2007), *quoting Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored..."); *Sierra Club v. Jackson*, 833 F.Supp.2d 11, 32 (D. D.C. 2012), *quoting Jicarilla Apache Nation v. U.S. Department of the Interior*, 613 F.3d, 1112, 1120 (D.C. Cir. 2010) (" '[a]n agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decisionmaking.' EPA has failed ... to come to grips with its prior precedents. For that reason the Delay Notice is arbitrary and capricious."); *Sierra Club North Star Chapter v. LaHood*, 693 F.Supp.2d 958, 973 (D. Minn. 2010) ("A failure to acknowledge [National Park Service's] previous position, let alone explain why, in NPS's opinion, a change is justified, is the hallmark of an arbitrary and capricious decision.")

The LWG has complied with the Consent Order

EPA's assertion that the LWG is not in compliance with the Consent Order because of what appears to be EPA's arbitrary and unexplained change of mind is unreasonable. Although Tables 1 and 2 provide conclusive evidence of why EPA should retract this determination immediately, we highlight below the lack of any merit in the four "deficiencies" EPA's June 22 letter identifies in support of its determination that the LWG has failed to comply with the Consent Order.

¹ On June 29, 2012, EPA denied the LWG's request for a 30 day extension to prepare for dispute resolution, allowing the LWG only 14 additional days to review and evaluate over 200 pages of EPA revisions to a document EPA had under review for approximately 14 months. The LWG reserves the right to supplement the materials provided with this letter.

² Because EPA's comments on the BHHRA and the agreed resolution of those comments amount to nearly 1400 pages, the LWG is providing the documentation supporting this letter and Tables 1 and 2 on a CD, rather than in hard copy. If EPA would like paper copies of this backup documentation, please let us know.

First, EPA finds that the BHHRA provided “incorrect or misleading information.” EPA provides a single example in support of this finding:

“[T]he BHHRA repeatedly stated that the exposure assessment assumed someone ate fish every day of the year for 30 years. The LWG is fully aware that such a statement is not accurate.... EPA commented on this issue in our February 9, 2010 comment letter; however, the LWG failed to address it.”

As an initial matter, EPA commented on this issue in its July 16, 2010 comments; its February 9, 2010 letter does not address this topic at all. EPA’s July 16, 2010 comments request five specific edits to text in the BHHRA (comments S91, S96, S143, S150, and S179).³ Only two of these five comments (S96 and S150) were identified by EPA as “directed changes.”⁴ In fact, however, the LWG revised the text in all five instances precisely as EPA requested.⁵

Second, EPA finds that “the BHHRA does not fully reflect EPA’s directions for change, directions given years before and reiterated in our comments to prior versions.” As its single example, EPA quotes a “February 2010 comment” related to the description of exposure point concentrations. Again, this comment is found in EPA’s July 16, 2010 comment letter, not the February 2010 letter. And again, this comment (S52) is identified by EPA as “clarify,” not as “directed change.”⁶ Finally, there was a specific agreement between EPA and the LWG as to how to resolve comment S52. That resolution is documented in the LWG’s November 18, 2010 *General Responses to Non-Directed Comments on the BHHRA* and was acknowledged by EPA on December 8, 2010.⁷ In part, the LWG and EPA agreed that “the EPC will be identified as the mean, 95% UCL or maximum.”⁸ Notwithstanding this agreement, EPA now concludes that the BHHRA is “deficient” because it includes EPCs based on the arithmetic mean. Clearly, this cannot be the basis of any deficiency, because the BHHRA text faithfully reflects the documented agreement on comment S52. Therefore, EPA’s finding of “deficiency” on this point is incorrect in at least three particulars: (1) the comment was not made in February 2010; (2) it was not a directed change; and (3) the May 2, 2011 draft final BHHRA is consistent with the November 18, 2010 agreed resolution of that comment.

Third, EPA finds the BHHRA deficient because “[t]here were many instances in the BHHRA where the only explanation the LWG provides for why something is done was that EPA directed or otherwise required it be done.”⁹ This is an entirely new comment on the BHHRA,

³ See, Table 1. EPA’s July 16, 2010 comments on the BHHRA are at Tab 8.

⁴ *Id.* at p. 150.

⁵ See, May 2, 2011 Draft Final RI Report Appendix F BHHRA Main Text redline, attached at Tab 15, pp. 114, 117, 121, 155, 156, 175, and 176.

⁶ July 16, 2010 comments on the BHHRA, pp. 52-53 (at Tab 8).

⁷ November 18, 2010 *General Responses to EPA’s Non-Directive Comments on the BHHRA* at p. 6 (at Tab 11); EPA December 8, 2010 letter (at Tab 12).

⁸ Note that the Programmatic Work Plan (approved by EPA on June 29, 2004) states, “...the arithmetic mean concentrations will be used as EPCs for individual sampling locations” and “[s]ite-wide tissue EPCs will also be estimated using mean concentrations...” Programmatic Work Plan, Appendix C, page 26. While EPA guidance recommends using the 95 percent UCL to estimate the EPC, DEQ rules require use of the arithmetic mean concentration as an EPC. OAR 340-122-0084(1)(g). Therefore, both calculations were performed in the BHHRA.

⁹ EPA’s June 22 revisions actually delete all references to assumptions or evaluations in the BHHRA being directed by EPA. This revision itself violates EPA’s agreement with the LWG that “language stating that evaluations were done at the direction of EPA can remain in the revised BHHRA. Language implying opinion or judgment about the prudence of that direction will be removed.” September 15, 2010 *General Responses to Directed Comments on BHHRA* at p. 4 (at Tab 9). This agreement was acknowledged by EPA’s September 22, 2010 letter (at Tab 10).

and EPA has no basis for determining that the LWG is in violation of the Consent Order for failing to make revisions to the BHHRA that EPA has not previously requested, particularly in light of EPA's statement in July 2010 that it was providing a "complete set of comments" on the BHHRA and "clear direction on the specific revisions" necessary to resolve those comments. EPA's determination of noncompliance cannot be sustained on the basis of an alleged "deficiency" that relates to a brand-new issue.

Similarly, EPA's fourth identified "deficiency" in the BHHRA is that "EPA had to extensively modify the report to make the report understandable to the general public." Again, this is a completely new comment. We note, however, that, in July 2010, EPA provided 25 individual comments on the executive summary to the BHHRA.¹⁰ The LWG made detailed revisions to the executive summary consistent with the agreed resolution of these comments, and EPA has now deleted the entire executive summary. EPA has also deleted the conclusions of the draft final BHHRA, which the LWG modified extensively to address EPA's July 2010 comments. It is difficult for us to see how removing the executive summary and the conclusions from the BHHRA serve to make the report "understandable to the general public," and EPA's June 22 edits are themselves inconsistent with the agreed resolution of EPA's "complete set of comments" on the BHHRA. If EPA felt the LWG's initial BHHRA draft was not understandable to the general public, the LWG should have been able to assume any changes EPA thought were necessary to make it understandable would have been included in EPA's "complete comments" to that draft, not that EPA would feel the need to make new revisions in the final BHHRA to text that it did not even comment on in the first draft.

The June 22nd letter marks a breakdown in the RI/FS process

The LWG has worked with EPA at the Portland Harbor Site for over 11 years. Although there have been disagreements, the overall tone of the working relationship has been positive. Up until now, the LWG has never formally invoked dispute resolution, preferring to work diligently and creatively with EPA's staff and management to ensure the process moves forward to the shared goal of implementing cleanups at the Site. Based on all of the work described above that had been done to resolve EPA's comments on the 2009 version of the BHHRA, and EPA's representations to the LWG over the last several months that its comments would be clarifying in nature, the LWG was surprised and disappointed in the nature of EPA's June 22 letter.

EPA's June 22 letter is an indication of a breakdown in the process. Both sides reasonably expect that if meetings are conducted and resolutions are agreed to in writing, those agreements will be honored, even if key representatives who participated in the meetings and wrote the resolutions are no longer working on the project. If EPA subsequently had questions or concerns about how comments were resolved, they should have been raised at an early point in the process, not as an unsupported assertion of noncompliance and a threat of stipulated penalties at this late date.

The cleanup and monitoring process at this Site will likely occur over an extended period of time, certainly much longer than the 11 years already spent on the RI/FS. It is reasonable to assume that new staff, managers, and representatives will be assigned to the project for EPA, its

¹⁰ None of these 25 comments requested or directed deletion of the executive summary. See, July 16, 2010 EPA comments on the BHHRA, pp. 11-19 (at Tab 8).

partners, and the PRPs. The parties need to work well together to manage the inevitable disagreements that will arise on technical and legal issues. All parties involved in the cleanup process, including the members of the LWG, the dozens of additional parties that may participate in Consent Decree(s) negotiations, EPA, and EPA's partners need to have a reasonable assurance that every party will act in good faith and not renege on or disregard written resolutions of issues and disagreements.

EPA is likely aware that its assertion of noncompliance has generated several stories in the media. The LWG is serious about its responsibility to provide an RI/FS that is consistent with the National Contingency Plan and EPA national guidance, in compliance with the Consent Order, and that will support a cleanup at the Site that will protect public health and the environment. The fact that EPA's assertion of deficiencies and noncompliance is now a public issue is a significant concern to all of the members of the LWG. Rather than misstating the LWG's performance in public, the LWG strongly urges that EPA reconsider its position on the BHHRA and retract its letter. If EPA does have remaining issues or questions on the BHHRA, it should discuss and resolve those issues and questions with the LWG in accordance with the working relationship we have had to date with EPA.

EPA should retract its June 22 and June 29 letters and the directed revisions to the BHHRA

In summary, EPA's June 22 and 29 letters fail to demonstrate that the LWG has not complied with the Consent Order. EPA should retract the letters and their allegations of non-compliance immediately. EPA's directed revisions to the BHHRA are without factual support, an unexplained reversal of prior agency positions and agreements, are arbitrary and capricious, and represent a breakdown in the RI/FS process, and should be retracted as well.

Sincerely,



The Lower Willamette Group

Enclosures: Table 1: Deficiencies Identified by EPA in its June 22, 2012 Cover Letter
Table 2: General Categories of LWG Objections to the EPA June 22, 2012 Revisions
Table of Contents of Supporting Documentation
Supporting Documentation (on CD)

cc: Lori Cora, EPA Region 10 (via Federal Express)
Confederated Tribes and Bands of the Yakama Nation (via EPA Shared Server)
Confederated Tribes of the Grand Ronde Community of Oregon (via EPA Shared Server)
Confederated Tribes of Siletz Indians of Oregon (via EPA Shared Server)
Confederated Tribes of the Umatilla Indian Reservation (via EPA Shared Server)

Confederated Tribes of the Warm Springs Reservation of Oregon (via EPA Shared Server)
Nez Perce Tribe (via EPA Shared Server)
Oregon Department of Fish & Wildlife (via EPA Shared Server)
United States Fish & Wildlife (via EPA Shared Server)
Oregon Department of Environmental Quality (via EPA Shared Server)
LWG Legal
LWG Repository